No. 134.

Brief of Thomas & Bryant for D

Filed Nov. 22, 1897.

IN THE SUPREME COURT OF THE UNITED STATES.

J. B. SHEPARD,
Plaintiff in Error,
vs.
FRANK ADAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF DENVER,
Defendant in Error.

134

Brief and Argument of Defendant in Error.

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Brief and Argument of Defendant in Error.

We desire to make but two points in answer to the brief of the plaintiff in error in this case.

I.

NO WRIT OF ERROR LIES TO THIS COURT UNDER THE ACT CREATING THE CIRCUIT COURT OF APPEALS.

The question of the jurisdiction of the Court below within the meaning of that act is not involved in this case. There is no doubt that this case was one properly brought in the Federal Court, it being a suit by a receiver of a National Bank appointed under an act of Congress. Such a receiver is an officer of the United States, and a suit initiated by him is one arising under the Constitution and laws of the United States. The question of whether or not the Court acquired

jurisdiction by proper service of process is not one, we take it, which involves the jurisdiction of the Court within the meaning of that term as used in the act creating the Circuit Court of Appeals. We think the case is governed by that line of decisions holding that where the action is one clearly within the jurisdiction of a Federal Court, as distinguished from a State Court, the question of any error in its procedure, even though it challenges the authority of the Court over the defendant, is one which must be determined by the Circuit Court of Appeals.

Smith vs. McKay, 161 U.S., 355.
Cary vs. Railway Co., 161 U.S., 115.
Murphy vs. Colorado Paving Co., 166 U.S., 714.

II.

The Judgment of the Court Below Should Be Affirmed in Any Event.

This case was brought here to test the validity of the rule of the Circuit Court for the District of Colorado prescribing time for answering the complaint after the service of summons upon the defendant. The Code of Procedure of Colorado provides that where a summons is served upon a defendant within the county within which the action is brought, he shall have twenty days within which to answer, and if served out of the county, thirty days. By a rule of the Circuit Court of the United States, this time is changed so as to read that defendant shall have ten days within which

to answer if served within the county, and forty days if served without the county. It is claimed that as the service in this case was made within the county, the defendant is entitled to the twenty days prescribed in the Code. As we understand it, the contention is made that while the Circuit Court of the United States might possibly have the power to grant a longer period than that prescribed by the Code of Colorado, it has not the power to prescribe a shorter period. It is claimed that Section 914 of the Revised Statutes governs the Circuit Court in this particular, and that its rule is controlled by the State law. We don't think any such result follows.

In the first place, it has been laid down by this Court that the conformity required by Section 914 is, as near as may be, "not as near as may be *possible*, or as near as may be *practicable*. This indefiniteness may have been suggested by a purpose. It devolved upon the Judges to be affected the duty of construing and deciding, and gave them power to reject—as Congress doubtless expected they would do—any subordinate provision in said State statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice in their tribunals."

Indianapolis R. R. Co. vs. Horst, 93 U. S., 291.

And so this Court has held that the section does not apply in a great many particulars, and does not, in any way, shape or form, interfere with

the legitimate discretion and powers of the Circuit Courts in the administration of justice.

St. Clair vs. U. S., 154 U. S., 134, 153.

But so far as the issue and service of process is concerned, it is very evident that the provisions of the Colorado Code cannot prevail. The Code in the first place provides that civil actions may be commenced by the issuing of a summons or the filing of a complaint. The summons may be issued by the Clerk or by the plaintiff's attorney. It may be signed by the plaintiff's attorney. It is also provided that it may be served by a private person not a party to the suit; and the complaint need not be filed until ten days after the summons is issued.

Code of Civil Procedure, Secs. 32, 33, 34, 37.

It is very evident, under the provisions of Section, 911 and 918 of the Revised Statutes, that these provisions cannot prevail in the Federal Courts. All writs and process issuing from the Federal Courts must be under the seal of the Court and signed by the Clerk, and bear teste of the Judge of the Court from which they issue.

Revised Statutes of the United States, Sec. 911.

Under these conditions, the Circuit Court of the United States must make rules in regard to the commencement of an action differing from those provided for by the Code of Colorado, and, accordingly, in this Circuit the rule provides that suits can only be commenced by the filing of a complaint upon which summons shall issue, as prescribed by Section 911.

Under the Revised Statutes, the summons must be served by the Marshal. As to the return of the same, Section 918 gives to the Circuit Court direct power to make rules and orders over this matter. After providing expressly for the power to make rules governing the return of process, the section concludes:

"And otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

It will be presumed that the Circuit Court for the District of Colorado must have believed that it was necessary for the discharge of justice that a different rule should prevail, in regard to the requirements of answering, than that provided by the Code, and the reason is very evident. The State is divided into a large number of judicial districts, compact in territory, and a defendant served in any county of the district is generally within a short distance of the county seat of the county within which the action is commenced. Thirty days is not too long a period within which to require him to answer, but if served out of the county within which the suit is brought in the Federal Court, it is no more than right that he should be given a longer time. The Federal Court sits for the entire State of Colorado, with a territory larger in area than the entire New England States, and so far as the forty days for answering, when served outside of the county in which the suit is brought, the Circuit Court has done wisely in prescribing a longer period of time within which to

answer. And the same discretion prescribed a shorter period when the suit is brought within the county where the complaint is filed. If the power exists in the one case, it must exist in the other. The decisions of the Circuit Courts show that this has been the uniform ruling in regard to process, and we have been unable to find a case in which the right of regulating process has been denied.

Middleton Poper Co. vs. Rock River Paper Co., 19 Fed., 252.
Lowry vs. Stors, 31 Fed. Rep., 769.
Schwabacker vs. Reilly, 2 Dillon, 127.
Martin vs. Chriscuola, 10 Blatch., 211.

This Court has never passed directly upon the point involved, but the cases all seem to indicate that upon this point, as there cannot be conformity to the State statute, the whole matter is left to the sound direction of the Circuit Courts.

Respectfully submitted.

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